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IN THE DISTRICT COURT
AT TIMARU

I TE KŌTI-Ā-ROHE
KI TE TIHI-O-MARU

CRI-2023-076-001071
[2024] NZDC 12642

THE KING

v

BLAKE IVAN MILLER

Hearing:	31 May 2024
Appearances:	N Girgis and A McRae for the Crown A Holland for the Defendant
Judgment:	31 May 2024

NOTES OF JUDGE M A CROSBIE ON SENTENCING

Introduction

[1] Blake Miller has entered guilty pleas to three charges of sexual violation by unlawful sexual connection (maximum penalties of 20 years' imprisonment) and one

charge of doing an indecent act on a child (maximum penalty of 10 years' imprisonment).

[2] Today is a continuation of sentencing that I began two weeks ago. I asked counsel, particularly the Crown, to address me further on a particular point, namely the extent of concessions that Mr Miller should be given. That has now occurred. It is the first time I have ever taken that approach, because what the court was been asked for in terms of discounts for mitigating factors is as high as I have ever seen, particularly one aspect that I will come to.

[3] I advised that I would complete the sentencing process last Friday by AVL. However, I determined that it was extremely important that I return in person. It is important because today is not simply about you, Mr Miller. It is also about [the victim]. It is also about her family, who I acknowledge are here today. It is also about your family, who I acknowledge are here today. And it is about the wider community.

[4] It is also important because the words of [the victim]'s mother and father have resounded with me since I was here two weeks ago. It is important that I speak to all concerned face to face.

[5] Your offending, Mr Miller, has had an unquantifiable effect on this family group. For them, at the very least, I hope that today brings a closure of one part of the process and an ability to focus on their continuing love and support for [the victim]. Thank you so much for your words to me two weeks ago. I know they were difficult to write and to say. I felt your raw emotion, as I did your sense of betrayal by Mr Miller and your feeling of helplessness when it came to protecting your most precious. I understand your anger and your rage, but I also applaud your support of, and commitment towards, your daughter.

[6] In terms of why we are here, the facts are that you, Mr Miller, are [details deleted]. The matters that we are here about today were first disclosed by you to your parents in a general way on 5 November 2023 who then reported it to police the following day.

[7] The summary tells me that [details deleted]. On each of the occasions you followed a similar modus operandi which resulted in the four offences.

[8] In terms of the first charge of sexual violation by unlawful sexual connection and the charge of an indecent act on a child, between [dates deleted – a four-month period] you [details deleted]. You then woke her up and told her to remove her clothing. You then got into bed with her and momentarily placed your fingers into her vagina. You also caused her to hold your penis with her hand and to masturbate you until you ejaculated into a towel.

[9] In terms of the two remaining charges of sexual violation by unlawful sexual connection, on another occasion over this period you again got into bed with the victim and inserted your fingers into her vagina causing pain to her. You then sat on her bed and made her kneel in front of you. You placed your hands on the back of her head and pushed her head onto your penis causing it to go into her mouth. You continued that motion until you ejaculated into her mouth. You then made her spit out your ejaculate into a towel nearby.

[10] I have a substantial amount of information. I have:

(a) written victim impact statements from [the victim's parents] and I heard from them in person;

(b) submissions and supplementary submissions from Mr Holland for you;

(c) submissions and supplementary submissions from Ms Girgis for the Crown;

(d) a Probation report and supplementary memo;

(e) a clinical psychological report from [a clinical psychologist];

(f) your medical records, including a concussion review from 2021 and a report from the Seabrook McKenzie Centre from 2021;

(g) an affidavit from your mother;

(h) letters of apology from you to [the victim's parents] and to [the victim]; and

(i) a memorandum from Project Restore.

[11] I have read all these reports and documents and more than once.

[12] Why are we here today, Mr Miller? We are here first, to acknowledge the purposes and principles of the Sentencing Act 2002. I acknowledge all of them. But, in particular, the need to hold you to account. You are 19 years of age and for sentence on extremely serious charges. This is a public forum in which on behalf of the community I must hold you to account, not only for the gravity of the offending but for the effect of your offending on this young person and her family. For them this ordeal is far from over as [the victim] will need support for quite some time.

[13] Today is also about denouncing your conduct. [Details deleted].

[14] Today is also about deterrence.

[15] Counsel agree that the aggravating features of the offending are:

(a) the victim's age;

(b) the breach of trust;

(c) that the offending occurred on more than one occasion; and

(d) the flow-on effects to the victim and her family.

[16] Counsel agree that there should be a starting point of seven years imprisonment. That figure is not an arbitrary one but is based on guideline decisions from the higher courts. That figure should suggest to you the seriousness of what has occurred and the jeopardy for you.

[17] To the extent possible, today must be about rehabilitation and to endeavour through the sentencing process to ensure that you do not re-offend.

[18] Mr Holland, on the last occasion we met, stressed your remorse. A feature of [the victim]'s parents' statements is that they had not received an apology. It is at this point that I refer to a significant aspect of what occurred after your offending which was to alert your parents that you had done something very wrong. That, in turn, led to your father contacting police.

[19] In relation to the sexual offending, I have never encountered that in more than 20 years on the bench. It is highly unusual when combined with the contents of [the clinical psychologist]'s psychological report, the Probation report and your letters. I accept that you are remorseful.

Youth

[20] A central focus today is your youth. I understand that this factor and many others will be of little solace to [the victim]'s family. I understand that, as I do their grief. I sit here as a parent and a grandparent, although obviously today I am a judge. But I understand what they are feeling through my own experiences.

[21] Youth, particularly in young men whose brains do not properly form until, we are told, around the age of 25, is a potent aspect of the sentencing process. It goes to culpability and to the likelihood of rehabilitation and living an offence-free life. When one adds to that the effects of concussion and depression on the neurological and psychological functioning of a young man, one can understand what occasionally leads someone, who is much-loved, from a good home, and who has otherwise led a blameless life, to do something as serious and depraved as you have done.

[22] It does not excuse what you have done but both the law and science say that it provides a basis to understand why, of all people, you did this when you did it.

Remorse

[23] I accept that you are remorseful. I accept that you are ashamed. I also understand and accept that the shame has impacted on your parents who, of course, have done nothing wrong. From an early age they sought assistance to diagnose and support you around concussion but also around developmental issues.

[24] Mr Holland notes, importantly, that you are unlikely to receive any rehabilitation in the prison system. The Probation report says that and as a member of the Parole Board I know that young men with a low risk assessment will generally not qualify for treatment.

The Psychological Report

[25] The [psychological] report is useful. It is not a report written in a one-sided way. The risk assessment tools that he has used are tried and true and are tools utilised by the Department of Corrections and the New Zealand Parole Board. He records observations of low mood, depression, and being close to attempting suicide. As I have said, he reports strong feelings of shame and remorse.

[26] [The clinical psychologist] noted that you were the subject of some abuse at school and at the age of 15 had a severe head injury with acute post-concussion syndrome that saw you involved with the Laura Fergusson Brain Injury Trust. You are diagnosed with a specific learning disorder of dyslexia, social anxiety, and ADHD. As I have said, none of those diagnoses excuse your offending but it helps explain what makes you tick and why you have fallen so spectacularly from grace.

[27] [The clinical psychologist] believes that at the time of the offending you were on the edge of thoughts of killing yourself. He diagnoses a major depressive disorder and proposes treatment. He assesses your risk of re-offending currently as moderate to low and says it would be unsafe and unethical to sentence you to a term of imprisonment. I assume that he means that if the court was at the point where it could consider a non-custodial sentence it would be unsafe and unethical to do so.

Discounts

[28] I think that an elephant in the room is the issue of discounts. As should be clear to you by now, sentencing you today, Mr Miller, is not entirely about you. Denouncing and deterring your conduct sends a message to the community. It can also be a protective mechanism for the community.

[29] I hear, through my day-to-day life as a judge but also in the community, the concerns that exist around discounts which, of course, were a significant topic around the election with some strong public and political comment. My role is to apply the law. In applying the law, I must apply the law as it is set out both in statutes and by appellate authority.

[30] The decisions of the higher courts are binding on me, and those decisions include the now accepted approach to providing consideration and consolidation, albeit in a balanced way, of mitigating factors. Any change to that approach is in the hands of parliament and the appellate courts. As I have said, my role is to apply the law as it stands.

[31] In that regard, as I have said, counsel are agreed based on relevant authorities that the starting point is seven years' imprisonment. Applying the conventional two step methodology set out in *Moses v R*, Mr Holland submits that the following discounts totalling 95 per cent should be applied:[1]

(a) Guilty plea, 25 per cent.

(b) Assistance to police and remorse, 25 per cent.

(c) Youth, 25 per cent.

(d) Previous good character, 10 per cent.

(e) Personal circumstances and rehabilitative prospects, 10 per cent.

[1] *Moses v R* [2020] 3 NZLR 583.

[32] In contrast, the Crown submits that the following discounts totalling up to 72 per cent are appropriate:

(a) Guilty plea, 25 per cent.

(b) Assistance to police, 15 to 20 per cent.

(c) Youth and previous good character, 17 per cent.

(d) Personal circumstances and rehabilitative prospects, five to 10 per cent.

Home Detention

[33] For you, Mr Holland submits that a sentence of home detention should be imposed. The Crown agrees that an end sentence of home detention may be appropriate if a notional end sentence of less than two years is reached.

[34] No submissions have been advanced as to the precise length of home detention or imprisonment, although it is apparent to me what that might be by virtue of the discounts suggested.

Consideration of Relevant Factors

Guilty Plea

[35] I turn now to the appropriate approach and discounts in this case. There is no doubt as a matter of law you are entitled to 25 per cent for your early guilty plea. The Crown and defence, as I have said, agree.

Disclosure of offending and remorse

[36] The next factor is assistance to police and remorse, which is a somewhat unique part of the offending and sentencing. On 5 November 2023 ([details deleted]) your mother noticed that you were unusually quiet. She and your father asked you numerous times over a period of approximately 45 minutes what was wrong. You

eventually revealed that you had done something to [the victim]: "In a sexual way". You did not go into details about the offending. You then became angry and grabbed a knife from the kitchen. I am mentioning all this by way of context because it is relevant to the level of discount.

[37] This prompted your mother to contact the Canterbury After-Hours Mental Health Line and speak with a registered nurse. At one point when the nurse lost contact, she contacted police and reported that you had a knife but did not disclose the offending. You eventually calmed down. You spoke to the nurse briefly over the phone but did not reveal any details of the offending.

[38] The next day, on 6 November 2023, your father spoke to police and disclosed that you had owned up to touching [the victim]. He was asked whether you were aware that he was calling police. He said that you were not aware but that you: "Basically knows". He was asked about the extent of your offending and said that it: "Started off as little stuff," but: "It's just getting worse and worse and we can't get to the bottom of it".

[39] On 13 November 2023 police interviewed [the victim] who disclosed the details of the offending. You were interviewed the following day on 14 November 2023 but did not comment on the allegations, as of course is your right.

[40] The Crown acknowledges that your disclosure meant your offending came to light in a timely manner. However, it submits that 15 to 20 per cent is a sufficient discount. The Crown points out that you did not report your offending to the authorities yourself. Rather, you only disclosed a limited amount to your parents after persistent enquiries. The details of your offending were obtained from the victim. The Crown also submits the court cannot be certain that the offending would never have come to light, unlike in the decision of *Renwick v R*, for example.[2]

[41] The defence asks the court to consider your mental state at the time of the disclosure and submits that your confession is no less valuable merely because it was made to your parents, reluctantly, or without all of details of the offending.

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[2] *Renwick v R* [2020] NZCA 480.

[42] The key point, in Mr Holland's submission, is that the police would not have been aware of the offending if you had not said anything. Mr Holland points out that [a period of time] had passed when you spoke to your parents and there was nothing to suggest that your offending was likely to surface during that time. Accordingly, the defence seeks a discount of at least 25 per cent.

[43] Case law reveals that there are two principal justifications for reducing a defendant's sentence based on a confession:

(a) a strong public interest in encouraging offenders to confess crimes to authorities, especially when they may not otherwise be detected. The relevant authorities there being *R v Sanday* and *S v R*;[3]

(b) the confession may demonstrate that a defendant is remorseful for their offending, the authority there principally being *Renwick v R*.[4]

[44] Counsel have referred me to several decisions in which discounts have been provided for self-reporting. They include *R v Sanday* as above; *S v R* as above; *Renwick v R* as above; *R v Lynch*; *Disciple v Police*; *Gillard v R*; *R v Gay*.[5]

[45] I do not propose to provide analysis of each of these cases in Court, bearing in mind I am not only speaking just to you but to your parents and to the victim's parents. I have reviewed all the cases but will provide a brief analysis of some that I regard as relevant.

[46] *Renwick v R*: Mr Renwick was acquitted on charges of indecent assault and sexual violation. He subsequently presented himself to a police station and confessed to the offending. This resulted in him being re-tried. The Court of Appeal considered that a discount of 20 per cent for exceptional remorse was appropriate.

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[3] *R v Sanday* CA146/99, 29 July 1999; *S v R* [2017] NZHC 205 at [30]– [31].
[4] *Renwick v R* [2020] NZCA 480.
[5] *R v Lynch* HC, Hamilton CRI-2010-019-003449, 9 September 2010; *Disciple v Police* [2022] NZHC 2797; *Gillard v R* [2020] NZHC 1140; *R v Gay* [2017] NZHC 3149.

[47] In *S v R*, S wrote a letter to prison authorities in which he referred to having committed: "Child sex crimes with my own family. She was under 10 years old." He also wrote a letter to his mother confessing to having sex with her grandchild. The matter was referred to police by prison officers. Mander J held that there was nothing to suggest S's daughter was likely to disclose the offending and that the decision to report the offending arose from within and a discount of 20 per cent was deemed appropriate.

[48] In *R v Gay*, Mr Gay requested to speak to a police officer to disclose offending that had occurred in 1985 and the 1990s. The Crown acknowledged that the offending would have remained undetected but for the defendant disclosure. Mr Gay was not remorseful, rather he wished to get the offending off his chest. In that case, again, Mander J allowed a 25 per cent discount.

[49] What I do not have is an analysis of how, in those decisions, the discounts lined up against other discounts applied in each case. I will come in a moment to some considerations about how discounts occur, side by side, how they rank, and issues of the accumulation of discounts.

[50] Any discount must be fact-specific, and I am dealing with the facts in this case. As in *S v R*, there is nothing to suggest that your offending was likely to come to light in the foreseeable future, although there is probably a better chance than in *R v Gay* or *Renwick v R*. As Nicholson J commented in *D v Police*: "The very great majority of childhood sexual abuse goes unreported".[6]

[51] However, since that decision there has been considerable work in the way of education with respect to sexual transgressions, children feeling safe, and a good deal of time and effort put into counselling and support both in educational environments, primary, secondary and tertiary.

[52] There is no doubt police obtained substantial help from your disclosure, and this must be recognised in your sentence. However, in my assessment your confession was not as forthright or as forthcoming as those in the above cases. In fact, it is not

[6] *D v Police* (2000) 17 CRNZ 454 cited in *S v R* [2017] NZHC 205 at [25].

clear that *you* ever intended police to become aware of the offending. Your confession only came about after you were subjected to significant scrutiny from your parents and, even then, you did not reveal any details. The details of the offending, of course, came from [the victim], as one might expect in such a case. That is not a criticism of you and, of course, one must consider your age.

[53] If one reason for reducing a defendant's sentence is to encourage self-reporting of offending, greater reduction should be given where a defendant has done so fully and frankly to the relevant authorities, thereby maximising the probability of a successful prosecution.

[54] Your confession may have been reluctant, but your actions and demeanour show that you were distressed about what you had done and, considered alongside your offer of reparation and your apology to the victims, it is evident that you are remorseful for the offending and the harm that it has caused.

[55] I consider that a discount of 20 per cent appropriately reflects the assistance you have provided to police and your expression of remorse.

Youth and character

[56] Mr Holland submits that you should receive 25 per cent for youth and 10 per cent for previous good character. The submissions are based firstly on *Mines v R* where a youth discount of 30 per cent was upheld for a defendant aged 13, 16 and 20 at the time of the offending. Secondly, on *Solicitor-General v Rawat* where Mallon J held that 25 to 30 per cent for youth and 10 per cent for previous good character would be appropriate for an 18-year-old who had sexually offended against an 11 year old.[7] In *Rawat*, the defendant was 31 at the time of sentencing and had demonstrated he was a law-abiding citizen in the 12 years since the offending took place.

[57] The Crown submits that 17 per cent is sufficient for youth based on *Rolleston v R* and that you should receive no additional discount for your previous

[7] *Mines v R* [2022] NZCA 113; *Solicitor-General v Rawat* [2021] NZHC 2129.

good character.[8] The Crown says there is no evidence of community contribution which might justify a discount. In response to that submission, I note that discounts for previous good character are routinely given for the mere fact a defendant has no previous convictions.

[58] Youth is generally considered relevant for three reasons, and I draw from *Churchward v R*.[9]

(a) young people have neurological differences which make them more impulsive;

(b) imprisonment has a greater impact on young people;

(c) young people have a greater capacity for rehabilitation.

[59] My focus is on the first of these considerations since I am being asked to provide discounts for your prospects of rehabilitation and the impact that imprisonment will have on you considering your characteristics.

[60] It is readily apparent that your immaturity and impulsivity has factored into your offending, and, in this regard, I refer to [the clinical psychologist]'s report at (8.10) and (9.4). I recognise that *Rawat* is a comparison, because the defendant was 18, and your offending was linked to your impulsive decision-making. *Rolleston* is slightly different because the defendant's offending was predatory and persistent.

[61] In this case it is instructive that the offending occurred more than once, so it was not one-off. It was not spontaneous. There was a significant degree of seriousness in terms of physicality of the facts as I have stated them to be.

[62] In my assessment the Crown's submission as to a discount of 17 per cent is too low. Based on my assessment of the authorities but, more so the facts in this case and the seriousness of the offending, the overall discount for youth should be 20 per cent.

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[8] *Rolleston v R* [2018] NZCA 611.
[9] *Churchward v R* [2011] NZCA 531 at [77].

[63] In my view, a discount for your previous good character of five per cent is sufficient. The present case is distinguishable from *Rawat* on this point, because the defendant in that case demonstrated good character over a substantial period in the years after the offending. Nevertheless, your absence of previous convictions deserves some recognition and the authority there is *R v Hockley*.[10]

Personal circumstances and rehabilitation

[64] You faced several challenges through your high school years. You were struggling with dyslexia which was not diagnosed until 2021 when you were 16. You suffered two rugby-playing concussions which led to you experiencing some issues and, as I have said, [the clinical psychologist] opines on the issues of social anxiety, depressed mood, and suicidal ideation.

[65] Together, these challenges resulted in your becoming isolated from peers, which may be an important factor underlying the offending, according to [the clinical psychologist]. In my assessment it does diminish your moral culpability to a small degree and therefore warrants some recognition.

[66] Since engaging with [the clinical psychologist], you have started a course of antidepressants. You have engaged in safety-orientated discussions with your sister about offending and taken various steps to reduce social isolation. These are small but encouraging steps which further serve to reduce your risk of re-offending.

[67] Mr Holland suggests a discount of 10 per cent should be awarded to reflect these matters. The Crown is saying that five to 10 is sufficient.

[68] The justification for a discount in these matters is two-fold. First, you are likely to find any sentence imposed on you more arduous than an average offender and, secondly, a rehabilitative sentence is more likely to be effective.

[69] I note that I have already afforded discounts for youth, remorse, and previous good character for similar reasons. In the circumstances I consider a five per cent

[10] *R v Hockley* [2009] NZCA 74 at [30].

discount is sufficient as many of the mitigating features for which I have given discounts are inter-related and caution is required to avoid double-counting.

Conclusion on discounts

[70] In terms of total discounts for personal mitigating features, I have stood back and provided discounts for:

(a) guilty plea - 25 per cent;

(b) assistance to police and remorse - 20 per cent;

(c) youth - 20 per cent;

(d) previous good character - five per cent;

(e) personal circumstances and rehabilitative steps - five per cent.

[71] Applying these discounts from a starting point of seven years' imprisonment leads to a notional end sentence of 21 months' imprisonment which demonstrates that there is clearly sufficient mitigation for the court to consider home detention for you.

[72] I have also considered the offer to pay $5,000 for emotional harm which, given the extreme effects on this family which not only have been emotional but also financial, I heard on the last occasion, in the scheme of things is a modest amount but one in which the court must have some regard. I will come to that.

[73] I should say that even if I was to accept the defence position of 85 per cent (or now, as it stands, 95 per cent) and a sentence that would result in, either, 13 or four months' imprisonment (or six months or two months' home detention), the length of such a sentence would not adequately reflect the seriousness of your offending or the purposes and principles. The issue highlights the risks that accompany an overly mathematical approach to sentencing and demonstrates the need to stand back at the end of the process so that an evaluative assessment can be made, which is the approach that I have chosen to take as I have worked through the various factors.

[74] The two-step methodology was first authoritatively described in *R v Taueki* with the goal of promoting consistency and transparency in the sentencing process.[11] It has obvious utility, but it was never intended to displace the discretion of sentencing judges. The Court of Appeal in *Taueki* cautioned against taking a formulaic or mathematical approach to sentencing as the Supreme Court held in *Hessell v R* sentencing remains an evaluative task.[12] The Court said:

> The task reflects the amalgam of sentencing discretion on the one hand which ensures the gravity of individual offending and circumstances of the offender are duly assessed and sentencing consistency on the other which tempers sentencing judgment to ensure that sentencing outcomes reflect the policy of like treatment for similar considerations.

[75] The Supreme Court made several important observations in *Hessell* which warrant, in my assessment, some further discussion. The Court of Appeal had decided that any guilty plea discount should be calculated at a new, third step in the methodology.[13] The Court of Appeal also proposed a 'sliding scale' for determining the extent of the discount based on when the plea was entered.

[76] The Supreme Court did not object to the third step,[14] but it did disapprove of the "rigid" approach used by the Court of Appeal to calculate the guilty plea discount, stating:[15]

> For the reasons given in this judgment, we consider that the heavily structured nature of this approach involved an inappropriate departure by the Court of Appeal from the statutory requirement of evaluation of the full circumstances of each individual case …

[77] Earlier in its judgment, the Supreme Court referred to Australian authorities that discuss the perils of mathematically quantifying discounts.[16] In *R v Gallagher*, for instance, Gleeson J commented:[17]

> It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself, will form a

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[11] *R v Taueki* [2005] 3 NZLR 372 (CA).
[12] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [43].
[13] The third step in the methodology has since been removed by *Moses v R*, above n 3.
[14] At [73].
[15] At [72].
[16] At [53].
[17] *R v Gallagher* (1991) 23 NSWLR 220 at 228.

> complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical.

[78] A majority of the High Court of Australia also observed in *R v Wong*:[18]

> So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.

[79] In Australia, judges have tended to favour a more holistic approach to sentencing, referred to as "instinctive synthesis". This is clearly reflected in *Gallagher* and *Wong*. The Supreme Court did not abandon the *Taueki* methodology in favour of the Australian approach, but it did draw inspiration from *R v Markarian* in ruling that the sentencing judge "must stand back and decide whether the outcome of the process followed is the right sentence".[19]

[80] This aspect of the Supreme Court's judgment may have initially been overlooked.[20] More recently, numerous cases have emphasised the need to "stand back" at the end of the sentencing process and consider whether the outcome reached is appropriate having regard to the purposes and principles of sentencing.[21] A relatively recent example is *Dickie v R*:[22]

> Youth offenders commonly present with more than one mitigating factor. It is always necessary to stand back and make an overall assessment when sentencing, and manifest injustice is assessed as a matter of overall impression. Discounts overlap and there is a risk that some statutory purposes of sentencing can be lost sight of when they are treated separately and simply tallied up. But the point remains that some offenders present with a combination of personal mitigating factors which may collectively justify a sentence substantially less than that which would otherwise be imposed.

[81] This step in the sentencing process helps guard against a trend sometimes referred to in New Zealand as "discount creep". "Discount creep" is essentially a manifestation of the concerns raised in *R v Gallagher* and *R v Wong*. It was described

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[18] *R v Wong* [2001] HCA 64 at [76] (emphasis in original).
[19] *Hessell*, above n 23, at [55] and [77] referring to *R v Markarian* [2005] HCA 25 at [37].
[20] See Luke Elborough "Standing back in *Martin v R*" [2023] NZLJ 35.
[21] See for example, *Moses v R*, above n 3, at [49]; *Crump v R* [2020] NZCA 287 at [109]; *Martin v R* [2022] NZCA 285 at [110].
[22] *Dickie v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [175].

by Downs J in *R v LB* as a "phenomenon by which closely related or interrelated mitigating features are artificially disaggregated, then each awarded full and discrete discount[s] to achieve a desired result".[23] Alluding to this phenomenon, the Court of Appeal stated in *Cossey v R* that it is inappropriate to accumulate mitigating factors without considering whether the final sentence adequately serves other sentencing purposes (such holding the offender accountable).[24]

[82] With this analysis in mind, I took the approach that I have enunciated to this point. Standing back in the present case, there are a complex number of mitigating factors personal to you. It is simply not possible to pull them apart and *accurately* assign a percentage to each factor. Attempting to do so results in an end sentence which fails to meet all the relevant purposes and principles of sentencing.

[83] A sentence as short as that advanced by you, in effect, would have been insufficient to denounce your offending which is undeniably serious and insufficient to deter others from doing the same. It would also be insufficient to hold you to account for the harm that you have done to [the victim], her family, and the community.

[84] In my assessment, the appropriate sentence is not one of 21 months' imprisonment. It is one of 10 months' home detention (factoring in also the small emotional harm payment). This is close to the most restrictive term of home detention that can be imposed, carrying with it strong elements of denunciation and deterrence. A sentence of home detention will also properly reflect your diminished moral culpability and accommodate significant rehabilitative needs.

[85] Home detention is uncommon for serious sexual offending. Section 128(b)(2) of the Crimes Act 1961 provides for a presumption in favour of imprisonment for offenders convicted of sexual violation. However, it is not without precedent. In the case we have already discussed, *Solicitor-General v Rawat*, the defendant, aged 18 at the time of the offending, raped and performed indecent acts on an 11-year-old girl on five separate occasions. From a starting point of eight years' imprisonment the Judge awarded discounts for guilty plea, remorse, willingness to make amends, good

[23] *R v LB* [2020] NZHC 94 at [53].
[24] *Cossey v R* [2021] NZCA 677 at [14].

character, youth, and the effect that a sentence of imprisonment would have on a child. This led to a notional end sentence of two years' imprisonment converted to 12 months' home detention.

[86] Mallon J viewed the starting point as lenient but within the available range. Her Honour also considered that the discount for remorse had been too generous, and no discount should have been given for the effect imprisonment would have had on the defendant's child. However, her Honour concluded that this had been balanced out by the low discount that had been given for youth. The end sentence was on the cusp of being inadequate but ultimately was left undisturbed.

[87] In the present case the offending, if one is to quantify these things as one must, is less serious than in *Rawat* and there are more significant mitigating circumstances. The decision solidifies my view that in the circumstances and based on ample guidance from the appellate courts in similar cases, that 10 months' home detention is the least restrictive outcome that is appropriate in the circumstances.

[88] I note that in the circumstances it is a sentence with which the Crown concurs.

[89] You will be sentenced to 10 months' home detention. It will be on the terms and conditions set out in the Probation report with the additional rider that you will take such treatment, programme, counselling, or intervention as may be considered appropriate. There will also be an emotional harm payment of $5,000 to be paid within 28 days.

[90] I conclude, as I started, by acknowledging the presence of your family and [the victim]'s family. I acknowledge that the sentence for them may not be one that they were expecting. However, in my assessment, the sentence is one that I am obliged to pass as a matter of law.

[91] I am obliged to counsel for the considerable amount of work that they have put into their submissions and this case.

[92] It should follow, I think, from my comments that based on the authorities relating to the youth of the defendant, his prospects of rehabilitation as they are assessed by [the clinical psychologist], and that low to medium risk which is, as yet, on a fully untreated basis, that I do not believe the interests of justice would be served by registration and I decline to make such an order.

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Judge M A Crosbie
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 10/06/2024